

# Statutory Qualifications for Executive Branch Positions

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## Summary

In the aftermath of Hurricane Katrina, some Members of Congress and others questioned the competence of leadership at the Federal Emergency Management Agency (FEMA). After investigating the federal response to the hurricane, the Senate Committee on Homeland Security and Governmental Affairs concluded that the agency's leader had "lacked the leadership skills that were needed for his critical position." In response, the Post-Katrina Emergency Management Reform Act of 2006 (P.L. 109-295, 120 Stat. 1394) stipulated that the FEMA Administrator, among other top agency leaders, must meet certain qualifications. President George W. Bush's signing statement for this act seemingly challenged the constitutionality of these requirements, and it stated that the "executive branch shall construe [the applicable provision] in a manner consistent with the Appointments Clause of the Constitution." Three Members of Congress then urged the President to "reconsider [his] position and join [them] in calling for strong standards and the highest professional qualifications for the leadership of FEMA and for open dialogue between the executive and legislative branches on issues of such significant importance to our nation's safety and security."

These events reflect broader interbranch differences over congressional authority to establish statutory qualifications. The preponderance of evidence and historical practice suggests that Congress generally has the constitutional authority to set such qualifications. The boundaries of this authority have not been conclusively drawn, however, and the executive branch, in recent years, has asserted that congressional authority in this area is more limited than congressional practice would suggest. Statutory qualification requirements might continue to be an area of conflict between Congress and the President. Inasmuch as these provisions are not self-enforcing, their success as a means of assuring competent leadership of the federal government will depend upon the two branches' adherence to them during the selection and confirmation processes.

In practice, it has not been unusual for Congress to mandate that appointees to certain positions meet specified requirements. Some statutory qualification provisions, like those for the FEMA Administrator, require that appointees have certain experience, skills, or educational backgrounds that are associated with competence. Other qualification provisions address a variety of characteristics, such as citizenship status, residency, or, for the purpose of maintaining political balance on regulatory boards, political party affiliation. Congress has used such statutory provisions selectively; most executive branch positions do not have them. This report provides background on the constitutional appointments framework, discusses Congress's constitutional authority to set qualifications, discusses congressional practices in this area, and provides related analysis and options. The report includes two tables with examples of existing positions with qualification requirements.

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## Introduction

In the aftermath of Hurricane Katrina, some Members of Congress and others questioned the competence of leadership at the Federal Emergency Management Agency (FEMA). After investigating the federal response to the hurricane, the Senate Committee on Homeland Security and Governmental Affairs concluded, among other findings, that the agency's leader had "lacked the leadership skills that were needed for his critical position."<sup>1</sup> The committee went on to recommend that future leaders of national emergency management efforts "have significant experience in crisis management, in addition to substantial management and leadership experience, whether in the public, private or nonprofit sector."<sup>2</sup>

At the time of Hurricane Katrina, appointees to the top FEMA leadership position were not required, in statute, to meet any qualifications.<sup>3</sup> This was changed by the Post-Katrina Emergency Management Reform Act of 2006,<sup>4</sup> under which the FEMA Administrator, among other top agency leaders, is required to meet certain qualifications. The act provides the following:

The Administrator shall be appointed from among individuals who have—(A) a demonstrated ability in and knowledge of emergency management and homeland security; and (B) not less than 5 years of executive leadership and management experience in the public or private sector.<sup>5</sup>

The Bush Administration seemingly challenged the legitimacy of this provision in the President's signing statement for the act. It reads, in part, as follows:

Section 503(c) of the Homeland Security Act of 2002, as amended by section 611 of the Act, provides for the appointment and certain duties of the Administrator of the Federal Emergency Management Agency. Section 503(c)(2) vests in the President authority to appoint the Administrator, by and with the advice and consent of the Senate, but purports to limit the qualifications of the pool of persons from whom the President may select the appointee in a manner that rules out a large portion of those persons best qualified by experience and knowledge to fill the office. The executive branch shall construe section 503(c)(2) in a manner consistent with the Appointments Clause of the Constitution.<sup>6</sup>

President George W. Bush appeared to take issue with the extent to which the qualifications might limit the pool of potential nominees to the position. The statement does not make clear whether the Administration saw Section 503(c)(2) as being in conflict with the Appointments Clause and, if so, in what way. The final sentence in the excerpt suggests that, to the degree that Section 503(c)(2) is seen to be in conflict with the Administration's reading of the Appointments Clause, the President might have elected not to abide by the provision. In response to the signing statement, three Members of Congress urged the President to "reconsider [his] position and join [them] in calling for strong standards and the highest professional qualifications for the leadership

<sup>1</sup> U.S. Congress, Senate Committee on Homeland Security and Governmental Affairs, *Hurricane Katrina: A Nation Still Unprepared*, 109<sup>th</sup> Cong., 2<sup>nd</sup> sess. (Washington: GPO, 2006), unpaginated chapter, "Conclusions and Findings."

<sup>2</sup> *Ibid.*, p. Recommendations - 4.

<sup>3</sup> The head of FEMA at that time was the Under Secretary for Emergency Preparedness and Response. Appointments to this position were to be made by the President, by and with the advice and consent of the Senate (P.L. 107-296, §103(a)).

<sup>4</sup> P.L. 109-295, 120 Stat. 1394.

<sup>5</sup> *Ibid.*, §611(10), as it amends §503(c) of the Homeland Security Act of 2002; 120 Stat. 1397; 6 U.S.C. §313(c)(2).

<sup>6</sup> U.S. President (G.W. Bush), "Statement on Signing the Department of Homeland Security Appropriations Act, 2007," *Weekly Compilation of Presidential Documents*, vol. 42, October 4, 2006, pp. 1742-1743.

of FEMA and for open dialogue between the executive and legislative branches on issues of such significant importance to our nation’s safety and security.”<sup>7</sup>

Both Congress and the President have an interest in assuring that the federal government is led by appointees who have the necessary qualifications to successfully and faithfully implement the law. As discussed later in this report, the preponderance of evidence and historical practices suggest that Congress has the constitutional authority to set such qualifications—as long as those qualifications do not amount to a *de facto* legislative designation. (See “Congressional Authority to Establish Qualifications for Leadership Positions,” below.) In many instances, Congress has mandated that appointees to leadership positions meet specified requirements. Some statutory qualification provisions, like those for the FEMA Administrator, require that appointees have certain experience, skills, or educational backgrounds that are associated with competence. Other qualification provisions address a variety of characteristics, such as citizenship status, residency, or, for the purpose of maintaining political balance on regulatory boards, political party affiliation. Congress has, however, used qualification provisions selectively; most executive branch positions do not have statutory qualifications. This report provides background on the constitutional appointments framework, discusses Congress’s constitutional authority to set qualifications, discusses congressional practices in this area, and discusses related options for congressional consideration. Examples of positions with statutory requirements or restrictions are provided in two tables in the **Appendix**.

## The Constitutional Appointments Framework

The Constitution charges Congress with the responsibility of determining how most leaders of the federal government will be appointed. The framework for this process is based in Article II:

[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.<sup>8</sup>

This clause sets presidential appointment by and with the advice and consent of the Senate (hereinafter referred to as the PAS process) as the default method for filling such positions.<sup>9</sup> But only certain officers of the United States *must* be appointed by that method. At the discretion of Congress, “inferior” officers may be appointed either under the default method or by the President alone, the courts, or agency heads. The Supreme Court has interpreted the phrase “Officers of the United States” to mean “any appointee exercising significant authority pursuant to the laws of the United States.”<sup>10</sup> A clear line between principal and inferior officers has not been established, but guidance of the Justice Department’s Office of Legal Counsel in this area suggests that “[i]n determining whether an officer may properly be characterized as inferior, ...

<sup>7</sup> U.S. Congress, letter from Senators Mary L. Landrieu, Susan M. Collins, and Joseph I. Lieberman to President George W. Bush, October 12, 2006. (Letter obtained from CQ Top Docs at CQ.com.)

<sup>8</sup> Art. II, Sec. 2, cl. 2.

<sup>9</sup> In a 1976 opinion, the Comptroller General reasoned that this provision indicates that all officers of the United States are to be PAS positions unless Congress affirmatively delegates that authority (Comp. Gen. Dec. No. B-183012, 56 Comp. Gen. 137).

<sup>10</sup> *Buckley v. Valeo*, 424 U.S. 1, 126 (1976).

the most important issues are the extent of the officer's discretion to make autonomous policy choices and the location of the powers to supervise and to remove the officer."<sup>11</sup>

In the case of executive branch departments and agencies outside the White House, Congress usually elects either to use the PAS process or to delegate authority to the agency head.<sup>12</sup> This enables the Senate to play a role in appointments to the leadership positions where it is most interested in maintaining influence over programs and policies. In some cases, Senators may influence nominee selection. They also may obtain commitments to carry out implementation of laws in certain ways during confirmation hearings, and they are likely to exact promises to testify before committees for oversight purposes.

## Congressional Authority to Establish Qualifications for Leadership Positions

The power of Congress to specify qualifications for a particular office is generally understood to be incident to its constitutional authority to establish the office. Historically, it has established qualifications many times; Justice Louis Brandeis, in a dissenting opinion in *Myers v. United States*, documented the long-standing nature of this practice. He observed that “a multitude of laws have been enacted which limit the President’s power to make nominations,” and added that “[s]uch restriction upon the power to nominate has been exercised by Congress continuously since the foundation of the Government.”<sup>13</sup> Justice Brandeis noted that

Congress has, from time to time, restricted the President’s selection by the requirement of citizenship. It has limited the power of nomination by providing that the office may be held only by a resident of the United States; of a State; of a particular State; of a particular district; of a particular territory; of the District of Columbia; of a particular foreign country. It has limited the power of nomination further by prescribing specific professional attainments, of occupational experience. It has, in other cases, prescribed the test of examinations. It has imposed the requirement of age; of sex; of race; of property; and of habitual temperance in the use of intoxicating liquors. Congress has imposed like restrictions on the power of nomination by requiring political representation; or that the selection be made on a nonpartisan basis. It has required in some cases, that the representation be industrial; in others, that it be geographic. It has at times required that the President’s nominees be taken from, or include representatives from, particular branches or departments of the Government. By still other statutes, Congress has confined the President’s selection to a small number of persons to be named by others.<sup>14</sup>

When specifying qualifications, Congress has, at times, come close to specifying the individual who must be appointed. In 1916, for example, Congress enacted a law providing that

<sup>11</sup> 20 Op. Off. Legal Counsel 124, 150 (1996). For a more detailed discussion of the distinction between principal and inferior officers, see “Principal Officer/Inferior Officer,” in CRS Report R40856, *The Debate Over Selected Presidential Assistants and Advisors: Appointment, Accountability, and Congressional Oversight*, by Barbara L. Schwemle et al.

<sup>12</sup> P.L. 112-166 (126 Stat. 1283), the Presidential Appointment Efficiency and Streamlining Act of 2011, added significantly to the number of positions filled by appointment of the President alone, however, by removing the requirement for Senate advice and consent for 163 positions. See CRS Report R41872, *Presidential Appointments, the Senate’s Confirmation Process, and Changes Made in the 112th Congress*, by Maeve P. Carey.

<sup>13</sup> *Myers v. United States*, 272 U.S. 52, 265 (1926) (dissenting opinion).

<sup>14</sup> *Myers v. United States*, 265-274. Footnotes omitted.

of the vacancies created in the Judge Advocate's Department by this act, one such vacancy, not below the rank of Major, shall be filled by the appointment of a person from civil life, not less than forty-five nor more than fifty years of age, who shall have been for ten years a Judge of the Supreme Court of the Philippine Islands, shall have served for two years as a Captain in the regular or volunteer army, and shall be proficient in the Spanish language and laws.<sup>15</sup>

These requirements would likely have limited the President's potential choices to one or two people, a limitation on the President's appointment power that might not withstand judicial scrutiny. Although Congress enjoys broad discretion in establishing qualifications, its constitutional power is probably not without limits. In its majority opinion in *Myers*, the Court noted that "the legislative power" comprehends the authority "to prescribe qualifications for office, or reasonable classification for promotion, ... provided of course that these qualifications do not so limit selection and so trench upon executive choice as to be in effect legislative designation."<sup>16</sup>

## Executive Branch Views

Although the preponderance of evidence and historical practice supports the understanding that Congress has broad authority in this area, this view is not universally held. Executive branch views, as articulated through presidential signing statements and opinions of the Department of Justice, have ranged from the assertion that Congress has no such authority to an acknowledgment of some such authority that lacks clear boundaries.

## Signing Statements

The view that Congress may have authority to establish only limited qualifications was evident in President Bush's signing statement for the Post-Katrina Emergency Management Reform Act of 2006, discussed in the introduction to this report, as well as other presidential signing statements. President Bush's 2006 signing statement for the Postal Accountability and Enhancement Act, for example, raised similar issues.

The executive branch shall construe subsections 202(a) and 502(a) of title 39, as enacted by subsections 501(a) and 601(a) of the Act, which purport to limit the qualifications of the pool of persons from whom the President may select appointees in a manner that rules out a large portion of those persons best qualified by experience and knowledge to fill the positions, in a manner consistent with the Appointments Clause of the Constitution.<sup>17</sup>

Previous Presidents, in other signing statements, also raised constitutional objections to qualification provisions. In a 1992 signing statement for legislation establishing the Morris K. Udall Scholarship and Excellence in National Environmental Policy Foundation, for example, President George H.W. Bush stated that the bill he was signing into law "purport[ed] to set qualifications, including requirements as to political party affiliation, for the trustees who will administer the foundation created by the bill." In his estimation, under the appointments clause of the Constitution, "congressional participation in such appointments may be exercised only

<sup>15</sup> 39 Stat. 169.

<sup>16</sup> *Myers v. United States*, 128 (Opinion of the Court).

<sup>17</sup> U.S. President (G.W. Bush), "Statement on Signing the Postal Accountability and Enhancement Act," *Weekly Compilation of Presidential Documents*, vol. 42, December 20, 2006, p. 2196.



through the Senate's advice and consent with respect to Presidential nominees." He stated that he would, therefore, "treat these provisions as precatory."<sup>18</sup>

A signing statement by President William J. Clinton raised specific, rather than blanket, objections to a qualifications provision, while agreeing to abide by its requirements:

[S]ection 21(b) of the Act would forbid the appointment as United States Trade Representative or Deputy United States Trade Representative, of anyone who had ever "directly represented, aided, or advised a foreign [government or political party] ... in any trade negotiation, or trade dispute with the United States." The Congress may not, of course, impose broad restrictions on the President's constitutional prerogative to nominate persons of his choosing to the highest executive branch positions, and this is especially so in the area of foreign relations. However, because as a policy matter I agree with the goal of ensuring the undivided loyalty of our representatives in trade negotiations, I intend, as a matter of practice, to act in accordance with this provision.<sup>19</sup>

A search of signing statements from the first six and a half years of President Barack Obama's time in office suggests that he did not, during that time, address the constitutionality of qualifications provisions in such a document. This may reflect a difference in his use of signing statements rather than a change in policy, however. Shortly after assuming office, President Obama issued a memorandum stating, "I will issue signing statements to address constitutional concerns only when it is appropriate to do so as a means of discharging my constitutional responsibilities."<sup>20</sup> He articulated four principles that he planned to adhere to in issuing signing statements, including the following:

Because legislation enacted by the Congress comes with a presumption of constitutionality, I will strive to avoid the conclusion that any part of an enrolled bill is unconstitutional. In exercising my responsibility to determine whether a provision of an enrolled bill is unconstitutional, I will act with caution and restraint, based only on interpretations of the Constitution that are well-founded.<sup>21</sup>

## Department of Justice Opinions

Historically, opinions of Attorneys General recognized a constitutional authority for Congress to set qualifications. In 1871, for example, Attorney General Amos T. Akerman offered the following opinion:

The argument has been made that the unquestioned right of Congress to create offices implies a right to prescribe qualifications for them. This is admitted. But this right to prescribe qualifications is limited by the necessity of leaving scope for the judgment and will of the person or body in whom the Constitution vests the power of appointment. The parts of the Constitution which confer this power are as valid as those parts from which Congress derives the power to create offices, and one part should not be sacrificed to the

<sup>18</sup> U.S. President (G.H.W. Bush), "Statement on Signing the Morris K. Udall Scholarship and Excellence in National Environmental and Native American Public Policy Act," *Weekly Compilation of Presidential Documents*, vol. 28, March 19, 1992, p. 507. Senate Majority Leader George J. Mitchell later rebutted, on the Senate floor, the signing statement's reasoning (Sen. George J. Mitchell, "The Udall Foundation Act," remarks in the Senate, *Congressional Record*, vol. 138, April 9, 1992, pp. 8689-8691).

<sup>19</sup> U.S. President (Clinton), "Statement on Signing the Lobbying Disclosure Act of 1995," *Weekly Compilation of Presidential Documents*, vol. 31, December 19, 1995, pp. 2205-2206. As noted later in this report, Congress waived the requirement in question for Clinton's appointment of Charlene Barshefsky to the position.

<sup>20</sup> U.S. President (Obama), "Memorandum on Presidential Signing Statements," *Daily Compilation of Presidential Documents*, March 9, 2009, DCPD-200900138, p. 1.

<sup>21</sup> Ibid. For more on Presidents' use of signing statements, see CRS Report RL33667, *Presidential Signing Statements: Constitutional and Institutional Implications*, by Todd Garvey.



other. An office cannot be created except under the condition that it shall be filled according to the constitutional rule.... Though the appointing power alone can designate an individual for an office, either Congress, by direct legislation, or the President, by authority derived from Congress, can prescribe qualifications, and require that the designation shall be made out of a class of persons ascertained by proper tests to have those qualifications; ... It has been argued that a right in Congress to limit in the least the field of selection, implies a right to carry on the contracting process to the designation of a particular individual. But I do not think this a fair conclusion. Congress could require that officers shall be of American citizenship or of a certain age, that judges should be of the legal profession and of a certain standing in the profession, and still leave room to the appointing power for the exercise of its own judgment and will; and I am not prepared to affirm that to go further, and require that the selection shall be made from persons found by an examining board to be qualified in such particulars as diligence, scholarship, integrity, good manners, and attachment to the Government, would impose an unconstitutional limitation on the appointing power. It would still have a reasonable scope for its own judgment and will. But it may be asked, at what point must the contracting process stop? I confess my inability to answer. But the difficulty of drawing a line between such limitations as are, and such as are not, allowed by the Constitution, is no proof that both classes do not exist.<sup>22</sup>

A 1979 opinion of the Justice Department's Office of Legal Counsel (OLC) was seemingly consistent with the earlier view, stating that

Congress has power to prescribe qualifications for office; but the power of appointment belongs to the President, and it cannot be usurped or abridged by Congress.... There is no settled constitutional rule that determines how these two powers—the power of Congress to prescribe qualifications and the power of the President to appoint—are to be reconciled, but it seems clear that there must be some constitutionally prescribed balance. The balance may shift depending on the nature of the office in question. For example, Congress has required that the President appoint members of both parties to certain kinds of boards and commissions; there is serious question whether Congress could constitutionally require the President to follow the same practice with respect to his Cabinet.<sup>23</sup>

In 1989, however, the Department of Justice articulated a different point of view. The Office of Legal Counsel issued a memorandum entitled “Common Legislative Encroachments on Executive Branch Constitutional Authority,” which stated, in part, the following:

Congress ... imposes impermissible qualifications requirements on principal officers. For instance, Congress will require that a fixed number of members of certain commissions be from a particular political party. These requirements ... violate the Appointments Clause. The only congressional check that the Constitution places on the President's power to appoint “principal officers” is the advice and consent of the Senate.<sup>24</sup>

In 1996, the Department of Justice, citing *Myers v. United States*, the 1871 opinion of the Attorney General, and the 1979 OLC opinion, acknowledged that Congress has the constitutional authority to set certain qualifications. Nonetheless, it asserted that the requirements for the U.S. Trade Representative overstepped this authority because of the foreign policy responsibilities of the position and the position's close proximity to the President:

Whatever the possible role of Congress in setting reasonable qualifications for office, ... a restriction ruling out a large portion of those persons best qualified by experience and knowledge to fill a particular office invades the constitutional power of the President and

<sup>22</sup> 13 Op. A.G. 516, 520-521, 524-525 (1871).

<sup>23</sup> 3 Op. O.L.C. 388, 389 (1979).

<sup>24</sup> 13 Op. O.L.C. 248, 250 (1989). (This memorandum was superseded by a 1996 OLC memorandum, which did not address the issue of qualifications (20 Op. O.L.C. 120).)

Senate to install the principal officers of the United States. Any power in the Congress to set qualifications “is limited by the necessity of leaving scope for the judgment and will of the person or body in whom the Constitution vests the power of appointment.” [Akerman] Congress may not dictate qualifications “unattainable by a sufficient number to afford ample room for choice.” [Akerman] Even if “there is no settled constitutional rule that determines how ... the power of the Congress to prescribe qualifications and the power of the President to appoint ... are to be reconciled,” we have opined that “there must be some constitutionally prescribed balance” and that this “balance may shift depending on the nature of the office in question.” [1979 OLC opinion] Here, the restriction is particularly egregious because the office in question involves representation of the United States to foreign governments—an area constitutionally committed to the President.... Furthermore, the position in question is especially close to the President. The Office of United States Trade Representative is “established within the Executive Office of the President.” ... Congress has also expressed [in statute] its sense that the United States Trade Representative “be the senior representative on any body that the President may establish for the purpose of providing to the President advice on overall economic policies in which international trade matters predominate.” ... We believe that, where an office thus entails broad responsibility for advising the President and for making policy, the President must have expansive authority to choose his aides.<sup>25</sup>

Although executive branch views, as expressed in these signing statements and opinions from the Department of Justice, are seemingly inconclusive about the precise range of Congress’s constitutional authority in this area, they clearly do not endorse the view that this authority is broad.

## Statutory Qualifications in Practice

Congress has established hundreds of executive branch positions in statute, but only a relatively small portion of the provisions creating these positions specify minimum qualifications that must be met by appointees. In some instances, these provisions require the President to appoint persons who possess certain characteristics. In other cases, the statute forbids the President from considering other characteristics in making an appointment. **Table A-1**, in the **Appendix** to this report, provides examples of department and agency leadership positions with statutory qualification requirements. For each example, the table identifies the position, its compensation level, the text of the qualification provision, the location of the provision in the *U.S. Code*, and the type of provision. **Table A-2**, also located in the **Appendix**, provides similar examples for independent collegial bodies, such as regulatory boards and commissions.

As suggested by Justice Brandeis’s previously mentioned dissenting opinion in the *Myers* case, Congress has developed a number of different kinds of qualifications for executive branch leadership positions. These include the following:

- requirements of political party balance on collegial bodies;
- restrictions on the basis of active duty or retired military status;
- restrictions on the basis of concurrent federal government employment;
- restrictions on the basis of criminal record;
- restrictions on the basis of prior employment;
- requirements of specified expertise, knowledge, or education;

<sup>25</sup> 20 Op. O.L.C. 279, 280-281 (1996).

- requirements that the individual be an authority in a specified field related to the position;
- requirements of demonstrated ability, or experience related to the position;
- requirements of fitness between the individual and the office;
- requirements of specified character trait (e.g., integrity);
- requirements of U.S. citizenship;
- requirements that the individual be selected without regard to political affiliation; and
- requirement of specified affiliations (e.g., membership in the Public Health Service for the Surgeon General).

For some positions, the qualifications are specific. The director of the Federal Housing Finance Agency, for example, is to be appointed “from among individuals who are citizens of the United States, have a demonstrated understanding of financial management or oversight, and have a demonstrated understanding of capital markets, including the mortgage securities markets and housing finance.” The law further provides a very specific disqualifying provision: “The Director ... may not ... have served as an executive officer or director of any regulated entity or entity-affiliated party at any time during the 3-year period preceding the date of appointment ... of such individual as Director ....”<sup>26</sup> Similarly, the position of controller at the Office of Federal Financial Management in the Office of Management and Budget (OMB) must be filled “from among individuals who possess—(1) demonstrated ability and practical experience in accounting, financial management, and financial systems; and (2) extensive practical experience in financial management in large governmental or business entities.”<sup>27</sup> These provisions seemingly provide objective criteria, such as demonstrated understanding of specific topics and ability and experience in certain fields, that must be used in the selection, by the President, and consideration, by the Senate, of nominees to these two positions.

For other positions, qualification requirements are more general. The position of director of operational test and evaluation at the Department of Defense, for example, is to be filled “without regard to political affiliation and solely on the basis of fitness to perform the duties of the office of Director.”<sup>28</sup> Similarly, appointments to the position of archivist of the United States are to be made “without regard to political affiliations and solely on the basis of the professional qualifications required to perform the duties and responsibilities of the office of Archivist.”<sup>29</sup> These provisions supply guidance to the President, in his selection, and to the Senate, in its consideration of a nominee. Compared with the language of more specific requirements, the phrases used in these provisions—regard for political affiliation, fitness to perform the duties, and professional qualifications required to perform the duties and responsibilities—would arguably be subject to a greater variety of subjective interpretations.

In some cases, Congress has established requirements that appointees be drawn from particular parts of the population. For example, at least seven of the 25 members of the Architectural and Transportation Barriers Compliance Board must be individuals with disabilities.<sup>30</sup> In other cases, Congress has specified that special experience or sensitivity to a population is required. In

<sup>26</sup> 12 U.S.C. §4512.

<sup>27</sup> 31 U.S.C. §504(b).

<sup>28</sup> 10 U.S.C. §139(a)(1).

<sup>29</sup> 44 U.S.C. §2103(a).

<sup>30</sup> 29 U.S.C. §792(a)(1)(A).

selecting appointees for the Committee for Purchase From People Who Are Blind or Severely Disabled, the President is to select several non-governmental appointees, one of whom is “conversant with the problems incident to the employment of the blind,” another of whom is “conversant with the problems incident to the employment of other severely disabled individuals,” a third of whom “represent[s] blind individuals employed in qualified nonprofit agencies for the blind,” and a fourth of whom “represent[s] severely disabled individuals (other than blind individuals) employed in qualified nonprofit agencies for other severely disabled individuals.”<sup>31</sup> Although many individuals would meet these qualifications, the requirements significantly reduce the size of the pool of individuals from which the President can select.

In some cases, Congress has applied a qualification to a broad category of positions for specific policy reasons. For example, many defense-related leadership positions are required to be filled by civilians, which reinforces the tradition of civilian supremacy in the United States government.<sup>32</sup> Only a civilian may be appointed as Secretary of Defense. In addition, an individual “may not be appointed [to the position] within seven years after relief from active duty as a commissioned officer of a regular component of an armed force.”<sup>33</sup> Military service restrictions of one kind or another apply to many other leaders of the Department of Defense, as well, including the Deputy Secretary,<sup>34</sup> Under Secretaries,<sup>35</sup> Principal Deputy Under Secretaries,<sup>36</sup> and Assistant Secretaries.<sup>37</sup> Other executive branch leadership positions with military service restrictions include the Director and Principal Deputy Director of National Intelligence,<sup>38</sup> the Administrator and Deputy Administrator of the Federal Aviation Administration (FAA),<sup>39</sup> and the Administrator and Deputy Administrator of the National Aeronautics and Space Administration (NASA).<sup>40</sup>

## Qualification Modifications

Congress has sometimes modified qualifications it had established earlier. For example, an appointee to the position of Under Secretary for Health at the Department of Veterans Affairs was formerly required to be

a doctor of medicine ... appointed without regard to political affiliation or activity and solely—(A) on the basis of demonstrated ability in the medical profession, in health-care administration and policy formulation, and in health-care fiscal management; and (B) on the basis of substantial experience in connection with the programs of the Veterans Health Administration or programs of similar content and scope.

This provision was amended by the Veterans Health Programs Improvement Act of 2004.<sup>41</sup> Under the qualifications specified in the revised section, the appointee is no longer required to be a

<sup>31</sup> 41 U.S.C. §8502(b).

<sup>32</sup> For more on the history of this development, see Samuel P. Huntington, *The Soldier and the State: The Theory and Politics of Civil-Military Relations* (Cambridge, MA: Harvard University, 1957).

<sup>33</sup> 10 U.S.C. §113(a).

<sup>34</sup> 10 U.S.C. §132(a).

<sup>35</sup> 10 U.S.C. §§133, 134, 135, 136, and 137.

<sup>36</sup> 10 U.S.C. §§137a.

<sup>37</sup> 10 U.S.C. §138.

<sup>38</sup> 50 U.S.C. §3026(c).

<sup>39</sup> 49 U.S.C. §106(c) and (d).

<sup>40</sup> 51 U.S.C. §20111.

<sup>41</sup> P.L. 108-422; 118 Stat. 2379.

doctor of medicine, and must have “demonstrated ability in the medical profession, in health-care administration and policy formulation, *or* in health-care fiscal management,” rather than all three areas.<sup>42</sup> This amendment emerged from the House Committee on Veterans’ Affairs with the following explanation:

Current law requires the Under Secretary for Health to be a “doctor of medicine,” restricting the pool of candidates that may be considered by the President for nomination to the position. Senior executives in the health care industry who may have exceptional credentials and experience, but who are not doctors of medicine, are excluded from consideration.

The Committee bill would repeal the requirement for VA’s Under Secretary for Health to be a medical doctor and allow the Secretary flexibility to nominate candidates with demonstrated abilities to fill this key position from the widest spectrum of talents.<sup>43</sup>

## Qualification Waivers

Qualification provisions are created by law; they may also be waived by law, and Congress has occasionally done so on a case-by-case basis. Congress passed legislation waiving civilian status requirements for the appointments of General George C. Marshall as Secretary of Defense (1950),<sup>44</sup> retired Admiral James B. Busey and retired General Thomas C. Richards as FAA Administrator (1989 and 1992),<sup>45</sup> and Rear Admiral Richard H. Truly as NASA Administrator (1989).<sup>46</sup> In 2002, the civilian status limitation on the NASA Deputy Administrator was waived for the candidate of the President’s choosing for the duration of that fiscal year, rather than for a particular individual.<sup>47</sup> The President nominated an active duty Marine Corps officer to the position, then withdrew the nomination in the face of opposition, among key Senators, to setting such a precedent.<sup>48</sup> He subsequently nominated a civilian, who was confirmed.

In addition to these cases involving military officers, Congress has waived qualifications in other instances. In 1997, for example, Congress waived a conflict of interest restriction for the U.S. Trade Representative. The section provides that

[a] person who has directly represented, aided, or advised a foreign entity ... in any trade negotiation, or trade dispute, with the United States may not be appointed as United States Trade Representative or as a Deputy United States Trade Representative.<sup>49</sup>

This provision was waived to allow Charlene Barshefsky to be appointed to the position. As an attorney for a Washington law firm, she had “advised the Canadian government on trade matters and also represented the government of Quebec in a case involving lumber imports.”<sup>50</sup> Among the

<sup>42</sup> 38 U.S.C. §305(a). Emphasis added.

<sup>43</sup> U.S. Congress, House Committee on Veterans’ Affairs, *Department of Veterans Affairs Nurse Recruitment and Retention Act of 2004*, report to accompany H.R. 4231, 108<sup>th</sup> Cong., 2<sup>nd</sup> sess., H.Rept. 108-538 (Washington: GPO, 2004), p. 10.

<sup>44</sup> P.L. 81-788, 64 Stat. 853.

<sup>45</sup> P.L. 101-47, 103 Stat. 134; and P.L. 102-308, 106 Stat. 273.

<sup>46</sup> P.L. 101-48, 103 Stat. 136.

<sup>47</sup> P.L. 107-117, §307, 115 Stat. 2301.

<sup>48</sup> Bill Gertz and Rowan Scarborough, “Inside the Ring,” *Washington Times*, March 22, 2002, p. 9.

<sup>49</sup> 19 U.S.C. §2171(b)(4).

<sup>50</sup> Paul Blustein, “Clinton Seeks Waiver for Barshefsky,” *Washington Post*, January 9, 1997, p. E3.

arguments presented in favor of the waiver was the fact that Barshefsky was already serving as Deputy U.S. Trade Representative in 1995 when the restriction was enacted.<sup>51</sup>

## Qualifications for Members of Collegial Bodies

Statutory qualification requirements are common for members of collegial boards and commissions. (For examples of requirements for collegial bodies, see **Table A-2** in the **Appendix** of this report.) Arguably, such provisions serve to enhance both the independence and neutral competence of these entities.

Collegial boards and commissions are generally structured so that they have more independence from the President than do other executive branch agencies. As one congressional study stated with regard to regulatory bodies,

[h]istorically, Congressional interest in the regulatory agencies is rooted in the notion that these commissions were created by Congress, vested with Congressional authority to regulate interstate commerce and, therefore, had a special relationship to the legislative branch. The commission form, as it has been created and developed by Congress over the past ninety years, is a determined attempt to isolate the agencies both from precipitous change and from control by the Executive Branch. It was for those reasons that Congress established bipartisan commissions composed of multi-members, serving set terms expiring at staggered intervals, who could be removed by the President only upon a showing of sufficient cause.<sup>52</sup>

Qualification requirements for members of a collegial body can also serve to enhance the agency's independence by emphasizing the importance of neutral competence, relative to political considerations, during the selection and confirmation processes.

In the post-World War II era, the quality of the membership and functioning of regulatory bodies was a matter of concern for government scholars and observers. In 1949, the first Hoover Commission observed that “[a]ppointments to membership on [independent regulatory] commissions are sometimes below desirable standards because of the inadequate salaries offered, or the failure of the Executive to appreciate the importance of the positions.”<sup>53</sup> A 1960 report to President-elect John F. Kennedy was also critical of the quality of regulatory agency leaders:

It is generally admitted by most observers that since World War II a deterioration in the quality of our administrative personnel has taken place, both at the top level and throughout the staff.... Careful scrutiny of agency members from the standpoint of their qualifications as well as their prejudices in behalf of administering the legislative goals to which they were to be committed, was during these years too often replaced by a consideration of what political obligations could be repaid through appointments.... These attitudes have had a serious impact upon the regulatory agencies. At the top level initial expertise would be lacking and the want of devotion to the public service militated against its acquisition through continuing tenure. Top administrative positions appear to have been sought frequently as stepping stones to further political preference or to positions of importance within the industries subject to regulation. A too common complaint at the bar is that the

<sup>51</sup> Rep. Billy Tauzin, remarks in the House, *Congressional Record*, daily edition, vol.143, March 11, 1997, p. H822.

<sup>52</sup> U.S. Congress, Senate Committee on Government Operations, *Study on Federal Regulations: Vol. 1, The Regulatory Appointments Process*, S. Doc. 95-25, 95<sup>th</sup> Cong., 1<sup>st</sup> sess. (Washington: GPO, 1977), p. 16.

<sup>53</sup> U.S. Commission on Organization of the Executive Branch of the Government, *The Independent Regulatory Commissions: A Report to the Congress by the Commission on Organization of the Executive Branch of the Government* (Washington: GPO, 1949), p. 3.



staffs have captured the commissions and that independent and bold thinking on the part of the members of these agencies is absent.<sup>54</sup>

In the late 1970s, a Senate committee investigation found that the “pre-eminent problem with the regulatory appointments process, as it has operated in the past, is that it has not consistently resulted in the selection of people best equipped to handle regulatory responsibilities.”<sup>55</sup> The committee recommended that the organic acts for each collegial regulatory board and commission include the following language:

The President shall nominate persons for the Commission/Board to insure commission membership shall be balanced, with broad representation of various talents, backgrounds, occupations, and experience appropriate to the functions and responsibilities of the Commission/Board.... The Commission/Board shall be composed of members who by reason of training, education or experience are qualified to carry out the functions of the Commission/Board under this chapter.<sup>56</sup>

Although this specific language has not been included in the organic acts of all boards and commissions, many collegial bodies now have statutory provisions imposing similar requirements. (See **Table A-2.**)

## Statutory Qualifications: Analysis and Options

Should issues concerning the competence of executive branch officials become a high priority for Congress, it might consider adding qualification requirements to existing or new statutory executive branch positions. The use of statutory qualifications entails certain potential benefits and costs for Congress, the President, and the federal bureaucracy. These advantages and disadvantages are discussed in the next section.<sup>57</sup> This section is followed by a discussion of several options.

### Advantages and Disadvantages of Statutory Qualifications

Although some statutory qualification requirements address characteristics that are not explicitly related to competence (notably those setting civilian and citizenship status requirements), most appear intended to ensure that competent and qualified individuals are appointed to leadership positions. One student of the administrative process observed, “[t]he prime key to the improvement of the administrative process is the selection of qualified personnel. Good men can make poor laws workable; poor men will wreak havoc with good laws.”<sup>58</sup> Both Congress and the President have an interest in ensuring that the federal government is led by competent leaders who have the ability to implement the law successfully and faithfully. At the same time, inasmuch as the President is seen to be responsible for coordinating the management of the executive

<sup>54</sup> U.S. Congress, Senate Committee on the Judiciary, Subcommittee on Administrative Practice and Procedure, *Report on Regulatory Agencies to the President-elect*, committee print prepared by James M. Landis, 86<sup>th</sup> Cong., 2<sup>nd</sup> sess. (Washington: GPO, 1960), pp. 11-12.

<sup>55</sup> U.S. Congress, Senate Committee on Governmental Affairs, *Principal Recommendations and Findings of the Study on Federal Regulation, Volumes I-VI*, committee print, 96<sup>th</sup> Cong., 1<sup>st</sup> sess. (Washington: GPO, 1979), p. 13.

<sup>56</sup> *Ibid.*, p. 4.

<sup>57</sup> The analysis in this section applies primarily to positions filled through the advice and consent process, the method of appointment for most of the leadership positions discussed in this report. As noted in the tables in the **Appendix**, a few of the positions identified are filled through appointment by the President alone.

<sup>58</sup> U.S. Congress, Senate Committee on the Judiciary, Subcommittee on Administrative Practice and Procedure, *Report on Regulatory Agencies to the President-elect*, p. 66.



branch, it could be argued that he must be given the freedom to appoint leaders who will be accountable and, to some degree, politically loyal to him. These interests—competence, accountability, and loyalty—are not mutually exclusive. Nonetheless, they can be in tension. For example, research suggests that executive branch programs headed by mid-level managers, who are appointed at the agency level, may be better managed than those run by top executive branch leaders in presidentially appointed, Senate-confirmed positions.<sup>59</sup>

It could be argued that establishing minimum qualifications for a program's or agency's leadership position is likely to lead to improved performance by that program or agency. This argument assumes that the President would select, and the Senate would consider, a nominee on the basis of these qualifications. It also assumes that the Senate would more easily reject, on this basis, poorly suited candidates. Finally, it assumes that an appointee with these qualifications would do a better job of leading the program or agency than would an appointee without these qualifications. Although these assumptions might hold true in many cases where qualifications are stipulated, they are not guaranteed to hold in all situations.

The difficulties that may arise during the implementation of qualification provisions are illustrated by the nomination and appointment of Julie Myers to be Assistant Secretary of Homeland Security for U.S. Immigration and Customs Enforcement. This position, originally established by the Homeland Security Act of 2002 as the Assistant Secretary of the Bureau of Border Security, is to be filled by an individual who has “a minimum of 5 years professional experience in law enforcement, and a minimum of 5 years of management experience.”<sup>60</sup> The President nominated Myers to the position on June 29, 2005. Questions about whether or not Myers met the specified qualifications were raised and addressed during her confirmation hearing before the Senate Committee on Homeland Security and Governmental Affairs.<sup>61</sup> In the months after the hearing, some Senators were satisfied that Myers was qualified for the position, while others stated that her experience was insufficient and opposed the nomination on that basis.<sup>62</sup> The nomination was reported out of the committee and placed on the Senate Executive Calendar, but it was not considered by the full Senate during the 109<sup>th</sup> Congress.<sup>63</sup> Although reservations about Myers's qualifications may have prevented the nomination from coming to the floor at that time,

<sup>59</sup> John B. Gilmour and David E. Lewis, “Political Appointees and the Competence of Federal Program Management,” *American Politics Research*, vol. 34, January 2006, p. 22. The researchers conclude that they “have shown that programs administered by political appointees get systematically lower management grades than programs administered by senior executives” (p. 42). Their sample of senior executives includes both career employees and political appointees, however. See also David E. Lewis, “Chapter 6, Politicization and Performance: the Case of the Federal Emergency Management Agency” and “Chapter 7, Politicization and Performance: the Larger Pattern,” in *The Politics of Presidential Appointments: Political Control and Bureaucratic Performance* (Princeton: Princeton University Press, 2008).

<sup>60</sup> 6 U.S.C. §252(a)(2)(B). This position has a unique statutory context. Originally, the Homeland Security Act of 2002 established the position of Assistant Secretary of the Bureau of Border Security without specifying the means of appointment (P.L. 107-296 §442(a)(2)). As part of a modification of a presidential reorganization plan that rearranged border security functions, the position was renamed the Assistant Secretary for the Bureau of Immigration and Customs Enforcement and identified as a presidentially appointed Senate-confirmed position. (See U.S. Congress, House, *Reorganization Plan Modification for the Department of Homeland Security*, 108<sup>th</sup> Cong., 1<sup>st</sup> sess., January 30, 2003, H.Doc. 108-32 (Washington: GPO, 2003).)

<sup>61</sup> U.S. Congress, Senate Committee on Homeland Security and Governmental Affairs, *Nominations of Stewart A. Baker and Julie L. Myers*, hearing, 109<sup>th</sup> Cong., 1<sup>st</sup> sess., September 15, 2005, pp. 16-21.

<sup>62</sup> Chris Strohm, “New Immigration Enforcement Chief Gets Mixed Reception,” *GovExec.com Daily Briefing*, January 5, 2006, at <http://www.govexec.com/dailyfed/0106/010506c1.htm>.

<sup>63</sup> Information obtained from the nominations database of the Legislative Information System (LIS), available to Congress at <http://www.congress.gov/nomis/>.

the nomination may also have been held up because of other concerns.<sup>64</sup> On January 4, 2006, the President gave Myers a recess appointment to the position.<sup>65</sup> He again nominated her to the position on January 9, 2007, at the beginning of the 110<sup>th</sup> Congress. On December 19, 2007, after Myers had served in the position for nearly two years, and less than a month before her recess appointment would have expired, the Senate confirmed her nomination.

Although many qualified individuals are nominated to, and confirmed for, positions with statutory qualifications, appointments to such positions can sometimes lead to a tug of war between the President and Congress. In such a case, (1) Congress establishes minimum experience requirements; (2) the President nominates the individual of his choice, who some argue has insufficient experience to meet these requirements; (3) the Senate does not confirm the nomination after some Senators oppose it because of this perceived shortcoming; (4) the President gives the nominee a recess appointment that lasts up to two years; and (5) the Senate confirms the individual, despite concerns about his or her qualifications, or, if the appointee is not confirmed, he or she must leave office when the recess appointment expires.

It could be argued that this interbranch conflict is a healthy exercise of constitutional checks and balances. But this dynamic seemingly imposes a potentially heavy cost on the federal bureaucracy. An individual whose leadership and management qualifications are publicly cast into doubt in the Senate can still serve in a major federal government leadership position if the President has the opportunity and elects to circumvent the confirmation process through a recess appointment.<sup>66</sup> Although the President can install his chosen nominee in this way, the process might diminish the appointee's stature and, potentially, his or her effectiveness.<sup>67</sup>

The prospect of an interbranch tug of war over qualifications might raise concerns, from an institutional perspective and on a practical level, about the worth of establishing such qualifications in the first place. Institutionally, this tug of war might sometimes damage Congress, particularly the Senate. To the extent that the President circumvents the Senate when a nominee's qualifications are in question, congressional prerogatives—the authority of Congress to specify the characteristics of an office and the role of the Senate in the appointment process—are undercut and, seemingly, these institutions are injured. As a practical matter, it could be argued that a qualification requirement is of little use if it is not sufficient to prevent an individual whose satisfaction of that requirement is in doubt in the Senate from holding the office.

It is worth noting, however, that statutory qualifications do not typically lead to such open conflicts between Congress and the President. Because these conflicts can impose political and institutional costs on the President as well, he has an incentive, in general, to abide by the requirements established by Congress. When Congress contemplates establishing qualifications, the possibility of such a conflict—a disadvantage—might be weighed against the potential benefits of the proposed requirements.

<sup>64</sup> Eileen Sullivan, "Recess DHS Appointments May Backfire, Expert Says," *CQ Homeland Security*, January 6, 2006, at <http://www.cq.com/doc/hsnews-2026893?2&search=fnIPMVzu>.

<sup>65</sup> U.S. President (G.W. Bush), "Personnel Announcement," January 4, 2006, at <http://georgewbush-whitehouse.archives.gov/news/releases/2006/01/20060104-3.html>.

<sup>66</sup> Notably, Congress has, since 2007, developed scheduling practices that can prevent the President's exercise of the recess appointment authority under certain circumstances. See CRS Report RS21308, *Recess Appointments: Frequently Asked Questions*, by Henry B. Hogue.

<sup>67</sup> The risk of injury to stature and effectiveness would seem to exist any time that the President makes a recess appointment of a nominee who is facing Senate opposition, whether qualifications are at issue or not. Seemingly, the magnitude of the risk would be greater where such issues have been raised, however, since subordinates and others might then question the fitness of the appointee for the position.

Conflicts concerning statutory qualifications have typically been resolved through the political process. Whether statutory qualifications legally bind the appointment process actions of the President or the Senate remains an open question. It is not clear what, if any, legal consequences might follow if either actor were to ignore such provisions.

Establishing specific qualifications for an advice and consent position entails other potential disadvantages. First, it narrows the field of individuals from whom the President may select, and otherwise worthy candidates might be eliminated prematurely from consideration. Second, the inclusion of certain qualifications in law could lead the President and the Senate to overlook or undervalue other potentially important qualities when evaluating candidates. Third, any statutory qualification imposed by one Congress necessarily places limitations on the discretion of a future Congress. But the qualifications that are necessary, or most important, for carrying out the responsibilities of a position might change over time. In such a situation, these provisions could delay or prevent the Senate from confirming a nominee they deem worthy. Finally, should the President and the Senate determine that it would be preferable, in a given situation, to appoint, to a given position, an individual who does not technically meet its qualifications, legislation might be necessary to waive the statutory requirements.

## **Options for Congressional Consideration**

With regard to statutory qualifications, several approaches are available to Congress. Most existing statutory qualifications will remain in force absent congressional action. Congress could reduce the number of positions with these kinds of requirements, either through a comprehensive review of such provisions or through incremental legislative changes, during a reauthorization process, for example. Congress could increase the use of statutory qualifications. Options include the continued incremental adoption of qualification provisions, the development of agency-wide minimum qualification thresholds, and the enactment of a government-wide standard for all government leadership positions. The Senate could also elect to establish threshold standards for confirmation of all or some presidential nominees.

### **Incremental Establishment of Qualifications**

Congress could continue recent legislative practices and establish statutory qualifications on a case-by-case basis. Under this option, the number of positions with these requirements would slowly increase. These provisions could be added where neutral competence is perceived to be of particular importance, or where other attributes, such as U.S. citizenship or civilian status, are deemed necessary. This approach would be consistent with the view that the need for program or agency leaders with particular characteristics should be weighed, on a case-by-case basis, against the President's need for flexibility in selecting his preferred leadership team. It assumes that the balance between these two interests will vary according to the responsibilities of the position and its proximity to the President. Whereas Congress might require members of an independent regulatory entity that deals with complex technical questions to have a certain educational background, for example, it might not stipulate any requirements for an Assistant Secretary whose responsibilities are assigned by the Secretary.

### **Agency-wide Qualifications**

Congress could establish, for one or more agencies, organization-wide threshold requirements. In effect, Congress has instituted such a threshold requirement—civilian status—for most top leadership positions at the Department of Defense. Such thresholds have also been established for the membership of many collegial bodies, especially regulatory boards and commissions, as

discussed above. These entities differ from departments and other executive branch entities, however, because they each have only a few uniform leadership positions.

In a variation of this approach, Congress could establish agency-wide requirements that vary according to each leadership position's level in an agency's hierarchy. During the 109<sup>th</sup> Congress, Senator Daniel K. Akaka introduced legislation that used this model. The bill would have established minimum leadership, management, and subject matter experience requirements for most top leaders at the Department of Homeland Security (DHS). It would also have required that appointees to top leadership positions in the department possess "a demonstrated ability to manage a substantial staff and budget."<sup>68</sup> Appointees to positions compensated at Levels II and III of the Executive Schedule, such as the Administrator of FEMA and DHS Under Secretaries, would have been required to meet the most rigorous standards proposed by the bill. Appointees to Level IV positions, such as most Assistant Secretaries, would have been subject to similar, but slightly less stringent, standards. The bill would have excepted the DHS Secretary and Deputy Secretary, as well as the Commandant of the Coast Guard, from these requirements.

The agency-wide qualifications approach might be particularly useful to Congress where broad agreement exists, particularly on the congressional committees of jurisdiction, regarding threshold standards for a particular agency. Agency-wide qualifications might be more difficult to establish where broad agreement on minimum standards does not exist or where the leadership positions for a given agency require a broad range of talents or experience.

## Government-wide Standards

Another approach that Congress could consider would be to establish government-wide requirements that would be applied to all or most top leadership positions. Congress has established government-wide requirements regarding citizenship through a recurring provision of the funding bill for the Department of the Treasury and other agencies. The provision's requirements are quite specific:

Unless otherwise specified in law during the current fiscal year, no part of any appropriation contained in this or any other Act shall be used to pay the compensation of any officer or employee of the Government of the United States (including any agency the majority of the stock of which is owned by the Government of the United States) whose post of duty is in the continental United States unless such person: (1) is a citizen of the United States; (2) is a person who is lawfully admitted for permanent residence and is seeking citizenship as outlined in 8 U.S.C. 1324b(a)(3)(B); (3) is a person who is admitted as a refugee under 8 U.S.C. 1157 or is granted asylum under 8 U.S.C. 1158 and has filed a declaration of intention to become a lawful permanent resident and then a citizen when eligible; or (4) is a person who owes allegiance to the United States: *Provided*, That for purposes of this section, affidavits signed by any such person shall be considered prima facie evidence that the requirements of this section with respect to his or her status are being complied with: *Provided further*, That for purposes of subsections (2) and (3) such affidavits shall be submitted prior to employment and updated thereafter as necessary: *Provided further*, That any person making a false affidavit shall be guilty of a felony, and upon conviction, shall be fined no more than \$4,000 or imprisoned for not more than 1 year, or both: *Provided further*, That the above penal clause shall be in addition to, and not in substitution for, any other provisions of existing law: *Provided further*, That any payment made to any officer or employee contrary to the provisions of this section shall be recoverable in action by the Federal Government: *Provided further*, That this section shall not apply to any person who is an officer or employee of the Government of the United States on the date of enactment of this Act, or to international broadcasters employed by

<sup>68</sup> 109<sup>th</sup> Cong., S. 2040, §3.

the Broadcasting Board of Governors, or to temporary employment of translators, or to temporary employment in the field service (not to exceed 60 days) as a result of emergencies: *Provided further*, That this section does not apply to the employment as Wildland firefighters for not more than 120 days of nonresident aliens employed by the Department of the Interior or the USDA Forest Service pursuant to an agreement with another country.<sup>69</sup>

Most full-time leaders are paid from appropriated funds. In effect, therefore, the provision restricts appointments, government-wide, to many top leadership positions.

If Congress found it necessary, such an approach could be used to put in place qualifications such as minimum experience or demonstrated ability. Qualifications that set discrete, objective standards might be more easily enforced than those that set more subjective requirements. Arguably, it is easier to measure whether or not a nominee has specific educational credentials than whether he or she meets the threshold of “related educational background.”

Notably, the appropriations provision above includes a number of exceptions. If Congress were to determine that *no* non-U.S. citizen should be appointed to a particular position, it would need to enact a separate, more restrictive, provision for that post. This example demonstrates the difficulty of establishing a government-wide standard that could cover all situations. Consequently, if Congress were to establish government-wide minimum standards, it might be necessary to create individual exceptions for certain positions.

## Senate Standards

Several of the options discussed above would set qualifications in statute. The Senate, of course, could establish confirmation standards that would, in effect, set qualifications for some or all nominations. This approach was recommended, for regulatory agency appointees, by the Senate Committee on Governmental Affairs as a result of its previously discussed late-1970s study. The committee recommended that

[t]he Senate should establish the following general standards to be applied in confirmation of regulatory agency appointees: (a) That by reason of background, training or experience, the nominee is affirmatively qualified for the office to which he or she is nominated. (b) That, in considering a regulatory appointment, the Senate shall consider the character and nature of the office, and the needs of the agency to which the nominee has been named. (c) That, in considering a regulatory appointment to a collegial body, the Senate shall consider the existing composition of that body and whether or not members of a single sector or group in society are too heavily represented. (d) That the nominee is committed to enforcement of the regulatory framework as established by Congress in the statutes. (e) That the nominee meet[s] the statutory qualifications to hold the office to which he or she was nominated.<sup>70</sup>

Such confirmation standards might be established in the Standing Rules of the Senate, or by standing order, either of which could be accomplished by Senate resolution.

General standards have been adopted by some individual committees for nominations within their jurisdictions.<sup>71</sup> For example, a rule of the Senate Committee on Agriculture, Nutrition and

<sup>69</sup> P.L. 113-235, Division E, §704; 128 Stat. 2380.

<sup>70</sup> U.S. Congress, Senate Committee on Governmental Affairs, *Principal Recommendations and Findings of the Study on Federal Regulation, Volumes I-VI*, p. 10.

<sup>71</sup> For more on Senate committee rules, generally, including those pertaining to nominations, see CRS Report R43799, *Senate Standing Committees' Rules on Legislative Activities and Executive Business: Analysis for the 113th Congress*,



Forestry provides that, “In considering a nomination, the committee shall inquire into the nominee’s experience, qualifications, suitability, and integrity to serve in the position to which he or she has been nominated.”<sup>72</sup> A rule of the Senate Committee on Homeland Security and Governmental Affairs links meeting its standards with a positive report from the committee, stating the “Committee shall recommend confirmation, upon finding that the nominee has the necessary integrity and is affirmatively qualified by reason of training, education, or experience to carry out the functions of the office to which he or she was nominated.”<sup>73</sup>

Additional rules, at either the committee or full Senate level, could establish either mandatory or optional consideration of standards during the confirmation process, and they could require either that the standards be considered or that they be followed, and/or include waiver and enforcement provisions.

A constitutional objection might be raised with regard to the establishment of specific Senate confirmation standards. Unlike statutory qualifications, which, as discussed above, can be seen to be an exercise of Congress’s constitutional authority to create offices, Senate confirmation standards would be established by the Senate alone, rather than the full Congress. On the other hand, it could be argued that such standards would be a legitimate exercise of the Senate’s constitutional authority to set its own rules. The rules would not directly limit the President’s authority to select a nominee, they would merely guide the Senate’s advice and consent process.

Alternatively, the Senate could take into account informal or external standards as part of its consideration of executive branch nominees. A potentially useful analogy currently exists in the consideration of judicial nominees. The American Bar Association’s Standing Committee on the Federal Judiciary currently provides the Senate Judiciary Committee with a rating of “well qualified,” “qualified,” or “not qualified” for all nominees to Article III court judgeships.<sup>74</sup> While these ratings are in no way binding on the Judiciary Committee, they do provide a consistent mechanism for evaluating nominees that does not invite the constitutional questions raised above. In addition, such an informal or external system could be adopted at the committee level or for specific issue areas.

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by Michael L. Koempel and Judy Schneider.

<sup>72</sup> U.S. Congress, Senate Committee on Agriculture, Nutrition and Forestry, Rule 4.2, “Standards,” *Rules of the Committee on Agriculture, Nutrition, and Forestry*, available at <http://www.ag.senate.gov/about/committee-rules>. A similarly worded rule has been adopted by the Senate Committee on Small Business and Entrepreneurship. See U.S. Congress, Senate Committee on Small Business and Entrepreneurship, “Nominations,” *Rules for the Committee on Small Business and Entrepreneurship - 114<sup>th</sup> Congress*, available at <http://www.sbc.senate.gov/public/index.cfm?p=Rules>.

<sup>73</sup> U.S. Congress, Senate Committee on Homeland Security and Governmental Affairs, “Rule 8. Confirmation Standards and Procedures,” *Rules of Procedure of the Committee on Homeland Security and Governmental Affairs*, committee print, 114<sup>th</sup> Cong., 1<sup>st</sup> sess., March 2015, S.Prt.114-12 (Washington: GPO, 2015), p. 25. A similarly worded rule has been adopted by the Senate Committee on the Budget. See U.S. Congress, Senate Committee on the Budget, “VII. Confirmation Standards and Procedures,” *Budget Committee Rules*, available at <http://www.budget.senate.gov/democratic/public/index.cfm/budget-committee-rules>.

<sup>74</sup> See American Bar Association, *American Bar Association Standing Committee on the Federal Judiciary: What It Is and How It Works*, Washington, DC, 2014, <http://www.americanbar.org/content/dam/aba/uncategorized/GAO/Backgrounder.authcheckdam.pdf>. Additional information on this process, as well as the overall process of judicial confirmations, can be found in CRS Report R43762, *The Appointment Process for U.S. Circuit and District Court Nominations: An Overview*, by Denis Steven Rutkus.

## Concluding Observations

The preponderance of evidence and historical practice suggests that Congress generally has the constitutional authority to establish statutory qualifications for federal government positions. Although Congress enjoys broad discretion in this area, there appears to be consensus that it may not set qualifications that limit the President's selection to the extent that the appointment is a de facto legislative designation. Neither case law nor statute has established a bright line that clearly defines the boundaries of this authority. Within this somewhat ambiguous environment, Congress, at times, has enacted standards that limit the President's selection pool to a greater extent than the executive branch sees as legitimate. In response, the President has issued signing statements, and the Justice Department has issued opinions, that challenge the constitutionality of such provisions. In practice, this difference of opinion has occasionally led to conflict between the two branches in the appointment process arena. Whereas Senators may sometimes block confirmation of a nominee who is perceived to lack sufficient qualifications, the President may, if he has the opportunity, use his recess appointment power to sidestep the Senate and install his preferred nominee. Although this dynamic might be suboptimal for the smooth functioning of the federal bureaucracy, for Congress, and for the President, it is part of a larger pattern of give and take between the President and Congress in areas of shared constitutional power. For the moment, interbranch conflicts concerning statutory qualifications are likely to be resolved in the political realm.

If establishing such standards became a legislative priority, Congress would have a number of options for asserting its prerogatives in this area. These options include a continuation of present ad hoc practices, establishment of agency-wide or government-wide standards, and the establishment, in the Senate, of confirmation standards. The success of statutory qualifications and confirmation standards as a means of ensuring competent leadership of the federal bureaucracy would depend on adherence to them during the selection and confirmation processes, and successful political resolution of interbranch conflicts as they arise.



# Appendix. Examples of Statutory Qualification Requirements

**Table A-1. Examples of Department and Agency Leadership Positions with Statutory Qualification Requirements**

Advice and Consent Position, Unless Otherwise Noted

Position <sup>a</sup> (Executive Schedule Level)	Provision(s)	General Requirement or Restriction
Secretary of Defense, Department of Defense (I)	... appointed from civilian life.... A person may not be appointed as Secretary of Defense within seven years after relief from active duty as a commissioned officer of a regular component of an armed force. [10 U.S.C. §113(a)]	• Military restriction
United States Trade Representative, Office of the United States Trade Representative (I)	A person who has directly represented, aided, or advised a foreign entity ... in any trade negotiation, or trade dispute, with the United States may not be appointed as United States Trade Representative or as a Deputy United States Trade Representative. [19 USCS §2171(b)(4)]	• Prior activity restriction
Director of National Intelligence, Office of the Director of National Intelligence (I)	... shall have extensive national security expertise. [50 U.S.C. §3023(a)(1)] Not more than one of [the Director of National Intelligence and the Principal Deputy Director of National Intelligence] may be a commissioned officer of the Armed Forces in active status. ... It is the sense of Congress that, under ordinary circumstances, it is desirable that one of the individuals serving [as the Director of National Intelligence and the Principal Deputy Director of National Intelligence] ... be a commissioned officer of the Armed Forces, in active status; or ... have, by training or experience, an appreciation of military intelligence activities and requirements. [50 U.S.C. §3026(c)]	• Expertise • Military restriction
Under Secretary for Acquisition, Technology, and Logistics Department of Defense (II)	... shall be appointed from among persons who have an extensive management background. [10 U.S.C. §133(a)]	• Related background
Administrator, Federal Aviation Administration, Department of Transportation (II)	... the President shall consider the fitness of the individual to carry out efficiently the duties and powers of the office.... The administrator must—(1) be a citizen of the United States; (2) be a civilian; and (3) have experience in a field directly related to aviation. [49 U.S.C. §106(b) and (c)]	• Fitness • U.S. citizenship • Military restriction • Related experience
Principal Deputy Director of National Intelligence, Office of the Director of National Intelligence (II)	...shall have extensive national security experience and management expertise ... [and] shall not, while so serving, serve in any capacity in any other element of the intelligence community.... Not more than one of [the Director and Principal Deputy Director of National Intelligence] may be a commissioned officer of the Armed Forces in active status. ... It is the sense of Congress that, under ordinary circumstances, it is desirable that one of the individuals serving [as the Director of National Intelligence and the Principal Deputy Director of National Intelligence] ... be a commissioned officer of the Armed Forces, in active status; or ... have, by training or experience, an appreciation of military intelligence activities and requirements. [50 U.S.C. §3026(a) and (c)]	• Related experience • Expertise • Concurrent employment restriction • Military restriction

Position <sup>a</sup> (Executive Schedule Level)	Provision(s)	General Requirement or Restriction
Director, Federal Housing Finance Agency (II)	... shall be appointed by the President ... from among individuals who are citizens of the United States, have a demonstrated understanding of financial management or oversight, and have a demonstrated understanding of capital markets, including the mortgage securities markets and housing finance. ... The Director ... may not ... have served as an executive officer or director of any regulated entity or entity-affiliated party at any time during the 3-year period preceding the date of appointment ... of such individual as Director .... [12 U.S.C. §4512]	<ul style="list-style-type: none"> <li>• U.S. citizenship</li> <li>• Related knowledge</li> <li>• Prior employment restriction</li> </ul>
Director, Institute of Education Sciences, Department of Education (II)	... shall be selected from individuals who are highly qualified authorities in the fields of scientifically valid research, statistics, or evaluation in education, as well as management within such areas, and have a demonstrated capacity for sustained productivity and leadership in these areas. [20 U.S.C. §9514(d)]	<ul style="list-style-type: none"> <li>• Authority in specified fields</li> <li>• Related demonstrated ability</li> </ul>
Administrator, Federal Emergency Management Agency, Department of Homeland Security (II)	... shall be appointed from among individuals who have ... a demonstrated ability in and knowledge of emergency management and homeland security; and ... not less than 5 years of executive leadership and management experience in the public or private sector. [6 U.S.C. §313(c)(2)]	<ul style="list-style-type: none"> <li>• Related demonstrated ability</li> <li>• Related knowledge</li> <li>• Related experience</li> </ul>
Inspectors General <sup>b</sup>	... shall be appointed ... without regard to political affiliation and solely on the basis of integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigations. [5 U.S.C. App. §3(a)]	<ul style="list-style-type: none"> <li>• Apolitical appointment</li> <li>• Specified character trait</li> <li>• Related demonstrated ability</li> </ul>
Controller, Office of Federal Financial Management, Office of Management and Budget, Executive Office of the President (III)	... shall be appointed from among individuals who possess—(1) demonstrated ability and practical experience in accounting, financial management, and financial systems; and (2) extensive practical experience in financial management in large governmental or business entities. [31 U.S.C. §504(b)]	<ul style="list-style-type: none"> <li>• Related demonstrated ability</li> <li>• Related experience</li> </ul>
Independent Member, Financial Stability Oversight Council (III)	... appointed by the President ... having insurance expertise. [12 U.S.C. §5321(b)(1)]	<ul style="list-style-type: none"> <li>• Related knowledge</li> </ul>
Archivist of the United States, National Archives and Records Administration (III)	... shall be appointed without regard to political affiliations and solely on the basis of the professional qualifications required to perform the duties and responsibilities of the office of Archivist. [44 U.S.C. §2103(a)]	<ul style="list-style-type: none"> <li>• Apolitical appointment</li> <li>• Related qualifications</li> </ul>
Deputy Director for Demand Reduction, Office of National Drug Control Policy, Executive Office of the President (III) [appointed by the President alone]	... the President shall take into consideration the scientific, educational, or professional background of the individual, and whether the individual has experience in the fields of substance abuse prevention, education, or treatment. [21 U.S.C. §1703(a)(1)(C)]	<ul style="list-style-type: none"> <li>• Related background</li> <li>• Related experience</li> </ul>

Position <sup>a</sup> (Executive Schedule Level)	Provision(s)	General Requirement or Restriction
Under Secretary for Health, Department of Veterans Affairs (III)	... shall be appointed without regard to political affiliation or activity and solely—(A) on the basis of demonstrated ability in the medical profession, in health-care administration and policy formulation, or in health-care fiscal management; and (B) on the basis of substantial experience in connection with the programs of the Veterans Health Administration or programs of similar content and scope. [38 U.S.C. §305(a)(2)]	<ul style="list-style-type: none"> <li>• Apolitical appointment</li> <li>• Related demonstrated ability</li> <li>• Related experience</li> </ul>
Under Secretary for Benefits, Department of Veterans Affairs (III)	... shall be appointed without regard to political affiliation or activity and solely on the basis of demonstrated ability in—(1) fiscal management; and (2) the administration of programs within the Veterans Benefits Administration or programs of similar content and scope. [38 U.S.C. §306(a)]	<ul style="list-style-type: none"> <li>• Apolitical appointment</li> <li>• Related demonstrated ability</li> </ul>
Under Secretary for Science, Department of Energy (III)	... shall be appointed from among persons who—(A) have extensive background in scientific or engineering fields; and (B) are well qualified to manage the civilian research and development programs of the Department. [42 U.S.C. §7132(b)(3)]	<ul style="list-style-type: none"> <li>• Related background</li> <li>• Related qualifications</li> </ul>
Under Secretary for Nuclear Security/Administrator, National Nuclear Security Administration, Department of Energy (III)	... shall be appointed from among persons who—(A) have extensive background in national security, organizational management, and appropriate technical fields; and (B) are well qualified to manage the nuclear weapons, nonproliferation, and materials disposition programs of the National Nuclear Security Administration in a manner that advances and protects the national security of the United States. [42 U.S.C. §7132(c)(2)]	<ul style="list-style-type: none"> <li>• Related background</li> <li>• Related qualifications</li> </ul>
Commissioner of Internal Revenue, Department of the Treasury (III)	... appointment shall be made from individuals who, among other qualifications, have a demonstrated ability in management. [26 U.S.C. §7803(a)(1)(A)]	<ul style="list-style-type: none"> <li>• Related demonstrated ability</li> </ul>
Deputy Administrator, Federal Aviation Administration, Department of Transportation (IV) [appointed by the President alone]	... the President shall consider the fitness of the appointee to efficiently carry out the duties and powers of the office. The Deputy Administrator shall be a citizen of the United States and have experience in a field directly related to aviation. An officer on active duty in an armed force may be appointed as Deputy Administrator. However, if the Administrator is a former regular officer of an armed force, the Deputy Administrator may not be an officer on active duty in an armed force, a retired regular officer of an armed force, or a former regular officer of an armed force. [49 U.S.C. §106(d)(1)]	<ul style="list-style-type: none"> <li>• Fitness</li> <li>• U.S. citizenship</li> <li>• Related experience</li> <li>• Military restriction</li> </ul>
Commissioner for Education Statistics, National Center for Education Statistics, Department of Education (IV) [appointed by the President alone]	... shall ... have substantial knowledge of programs assisted by the National Center for Education Statistics. [20 U.S.C. §9517(b)]	<ul style="list-style-type: none"> <li>• Related knowledge</li> </ul>
Assistant Secretary for Immigration and Customs Enforcement Department of Homeland Security (IV)	... shall have a minimum of 5 years professional experience in law enforcement, and a minimum of 5 years of management experience. [6 U.S.C. §252(a)(2)(B)]	<ul style="list-style-type: none"> <li>• Related experience</li> </ul>

Position <sup>a</sup> (Executive Schedule Level)	Provision(s)	General Requirement or Restriction
Director of Operational Test and Evaluation, Department of Defense (IV)	... [shall be] appointed from civilian life[,] ... without regard to political affiliation and solely on the basis of fitness to perform the duties of the office of Director. [10 U.S.C. §139(a)(1)]	<ul style="list-style-type: none"> <li>• Apolitical appointment</li> <li>• Fitness</li> </ul>
Administrator, Economic Regulatory Administration, Department of Energy (IV)	... shall be, by demonstrated ability, background, training, or experience, an individual who is specially qualified to assess fairly the needs and concerns of all interests affected by Federal energy policy. [42 U.S.C. §7136(a)]	<ul style="list-style-type: none"> <li>• Related demonstrated ability</li> <li>• Related background</li> </ul>
Principal Deputy Administrator, National Nuclear Security Administration, Department of Energy (IV)	... shall be appointed from among persons who have extensive background in organizational management and are well qualified to manage the nuclear weapons, nonproliferation, and materials disposition programs of the Administration in a manner that advances and protects the national security of the United States. [50 U.S.C. §2403(a)(2)]	<ul style="list-style-type: none"> <li>• Related background</li> <li>• Related qualifications</li> </ul>
Chief Medical Officer, Department of Homeland Security (IV)	... shall possess a demonstrated ability in and knowledge of medicine and public health. [6 U.S.C. §321e(b)]	<ul style="list-style-type: none"> <li>• Related demonstrated ability</li> <li>• Related knowledge</li> </ul>
Chief Financial Officers (IV)	... shall ... be appointed or designated, as applicable, from among individuals who possess demonstrated ability in general management of, and knowledge of and extensive practical experience in financial management practices in large governmental or business entities. [31 U.S.C. §901(a)(3)]	<ul style="list-style-type: none"> <li>• Related demonstrated ability</li> <li>• Related knowledge</li> <li>• Related experience</li> </ul>
United States Attorneys and Assistant Attorneys <sup>d</sup>	Each United States attorney shall reside in the district for which he is appointed, except that these officers of the District of Columbia, the Southern District of New York, and the Eastern District of New York may reside within 20 miles thereof. Each assistant United States attorney shall reside in the district for which he or she is appointed or within 25 miles thereof. The provisions of this subsection shall not apply to any United States attorney or assistant United States attorney appointed for the Northern Mariana Islands who at the same time is serving in the same capacity in another district. Pursuant to an order from the Attorney General or his designee, a United States attorney or an assistant United States attorney may be assigned dual or additional responsibilities that exempt such officer from the residency requirement in this subsection for a specific period as established by the order and subject to renewal. [28 U.S.C. §545(a)]	<ul style="list-style-type: none"> <li>• Residency requirement</li> </ul>
Members, National Indian Gaming Commission, Department of the Interior (Rate equal to V - Chair is rate equal to IV)	No individual shall be eligible for any appointment to, or to continue service on, the Commission, who ... has been convicted of a felony or gaming offense.... [25 U.S.C. §2704(b)(5)]	<ul style="list-style-type: none"> <li>• Felony conviction restriction</li> </ul>
Director, United States Fish and Wildlife Service, Department of the Interior (V)	No individual may be appointed as the Director unless he is, by reason of scientific education and experience, knowledgeable in the principles of fisheries and wildlife management. [16 U.S.C. §742b(b)]	<ul style="list-style-type: none"> <li>• Related education</li> <li>• Related experience</li> <li>• Related knowledge</li> </ul>

Position <sup>a</sup> (Executive Schedule Level)	Provision(s)	General Requirement or Restriction
Chief Scientist, National Oceanic and Atmospheric Administration, Department of Commerce (V) [appointed by the President alone]	... shall be an individual who is, by reason of scientific education and experience, knowledgeable in the principles of oceanic, atmospheric, or other scientific disciplines important to the work of the Administration. [Reorganization Plan No. 4 of 1970, §2(d); 15 U.S.C. §1511 note]	<ul style="list-style-type: none"> <li>• Related education</li> <li>• Related experience</li> <li>• Related knowledge</li> </ul>
Surgeon General, Public Health Service, Department of Health and Human Services <sup>e</sup>	... shall be appointed from individuals who (1) are members of the Regular Corps, and (2) have specialized training or significant experience in public health programs. [42 U.S.C. §205]	<ul style="list-style-type: none"> <li>• Corps membership</li> <li>• Related training</li> <li>• Related experience</li> </ul>
United States Marshals <sup>f</sup>	<p>Each marshal shall reside within the district for which such marshal is appointed, except that—(1) the marshal for the District of Columbia, for the Superior Court of the District of Columbia, and for the Southern District of New York may reside within 20 miles of the district for which the marshal is appointed; and (2) any marshal appointed for the Northern Mariana Islands who at the same time is serving as marshal in another district may reside in such other district. [28 U.S.C. §561(e)]</p> <p>Each marshal ... should have—(1) a minimum of 4 years of command-level law enforcement management duties, including personnel, budget, and accountable property issues, in a police department, sheriff's office or Federal law enforcement agency; (2) experience in coordinating with other law enforcement agencies, particularly at the State and local level; (3) college-level academic experience; and (4) experience in or with county, State, and Federal court systems or experience with protection of court personnel, jurors, and witnesses. [28 U.S.C. §561(i)]</p>	<ul style="list-style-type: none"> <li>• Residency requirement</li> <li>• Related experience</li> <li>• Related education</li> </ul>

**Source:** Developed by Congressional Research Service from information obtained from the *United States Code*.

**Note:** Table information current through September 1, 2015.

- a. Positions are arranged by Executive Schedule Level.
- b. “The annual rate of basic pay for an Inspector General ... shall be the rate payable for level III of the Executive Schedule under section 5314 of Title 5, United States Code, plus 3 percent.” [5 U.S.C. App. §3(e)]
- c. This position has a unique statutory context. Originally, the Homeland Security Act of 2002 established the position of Assistant Secretary of the Bureau of Border Security without specifying the means of appointment. As part of a modification of a presidential reorganization plan that rearranged border security functions, the position was renamed the Assistant Secretary for the Bureau of Immigration and Customs Enforcement and identified as a presidentially appointed Senate-confirmed position. (See U.S. Congress, House, Reorganization Plan Modification for the Department of Homeland Security, 108<sup>th</sup> Cong., 1<sup>st</sup> sess., January 30, 2003, H.Doc. 108-32 (Washington: GPO, 2003).)
- d. “Subject to sections 5315 through 5317 of title 5, the Attorney General shall fix the annual salaries of United States attorneys, assistant United States attorneys, and attorneys appointed under section 543 of this title at rates of compensation not in excess of the rate of basic compensation provided for Executive Level IV of the Executive Schedule set forth in section 5315 of title 5, United States Code” (28 U.S.C. §548).
- e. The Surgeon General is compensated as a commissioned officer at Level O-9. (See 37 U.S.C. 201.)
- f. With regard to pay, “The Director [of the United States Marshals Service] is authorized to appoint and fix the compensation of such employees as are necessary to carry out the powers and duties of the Service and may designate such employees as law enforcement officers in accordance with such policies and procedures as the Director shall establish pursuant to the applicable provisions of title 5 and regulations issued thereunder” (28 U.S.C. §561(f)).

**Table A-2. Examples of Positions on Independent Collegial Bodies with Statutory Qualification Requirements**

Advice and Consent Position, Unless Otherwise Noted

Agency <sup>a</sup> (Executive Schedule Level of Members)	Provision(s)	General Requirement or Restriction
Commodity Futures Trading Commission (IV - Chair is III)	... [T]he President shall (i) select persons who shall each have demonstrated knowledge in futures trading or its regulation, or the production, merchandising, processing or distribution of one or more of the commodities or other goods and articles, services, rights, and interests covered by this chapter; and (ii) seek to ensure that the demonstrated knowledge of the Commissioners is balanced with respect to such areas. Not more than three of the members of the Commission shall be members of the same political party. [7 U.S.C. §2(a)(2)(A)]	<ul style="list-style-type: none"> <li>• Demonstrated knowledge in related areas, balanced among members</li> <li>• Political balance on panel</li> </ul>
Consumer Product Safety Commission (IV - Chair is III)	In making such appointments, the President shall consider individuals who, by reason of their background and expertise in areas related to consumer products and protection of the public from risks to safety, are qualified to serve as members of the Commission. [15 U.S.C. §2053(a)]  Not more than three of the Commissioners shall be affiliated with the same political party. [15 U.S.C. §2053(c)]	<ul style="list-style-type: none"> <li>• Related background and expertise</li> <li>• Political balance on panel</li> </ul>
Council of Economic Advisors (IV-Chair is a II) [Chair is advice and consent position; other members are appointed by the President alone]	Each member shall be a person who, as a result of training, experience, and attainments, is exceptionally qualified to analyze and interpret economic developments, to appraise programs and activities of the Government in light of the policy declared in section 1021 of this title, and to formulate and recommend national economic policy to promote full employment, production, and purchasing power under free competitive enterprise. [15 U.S.C. §1023(a)(3)]	<ul style="list-style-type: none"> <li>• Related background and expertise</li> </ul>
Defense Nuclear Facilities Safety Board (III)	The Board shall be composed of five members appointed from civilian life ... from among United States citizens who are respected experts in the field of nuclear safety with a demonstrated competence and knowledge relevant to the independent investigative and oversight functions of the Board. Not more than three members of the Board shall be of the same political party. [42 U.S.C. §2286(b)(1)]	<ul style="list-style-type: none"> <li>• Military restriction</li> <li>• U.S. citizenship</li> <li>• Related demonstrated competence and knowledge</li> <li>• Political balance on panel</li> </ul>
Election Assistance Commission (IV)	Each member of the Commission shall have experience with or expertise in election administration or the study of elections. [52 U.S.C. §20923(a)(3)]  As designated by the President at the time of nomination, of the members first appointed—(A) two of the members (not more than one of whom may be affiliated with the same political party) shall be appointed for a term of 2 years; and (B) two of the members (not more than one of whom may be affiliated with the same political party) shall be appointed for a term of 4 years.... A vacancy on the Commission shall be filled in the manner in which the original appointment was made and shall be subject to any conditions which applied with respect to the original appointment. [52 U.S.C. §20923(b)]	<ul style="list-style-type: none"> <li>• Related experience or expertise</li> <li>• Political balance on panel</li> </ul>

Agency <sup>a</sup> (Executive Schedule Level of Members)	Provision(s)	General Requirement or Restriction
Equal Employment Opportunity Commission (IV - Chair is III)	... [T]he Equal Employment Opportunity Commission ... shall be composed of five members, not more than three of whom shall be members of the same political party. [42 U.S.C. §2000e-4(a)]	<ul style="list-style-type: none"> <li>• Political balance on panel</li> </ul>
Export-Import Bank Board of Directors (IV - Chair is III)	Of the five members of the Board, not more than three shall be members of any one political party. [12 U.S.C. §635a(c)(2)]	<ul style="list-style-type: none"> <li>• Political balance on panel</li> </ul>
Farm Credit Administration (IV- Chair is III)	<p>The Board shall consist of three members, who shall be citizens of the United States and broadly representative of the public interest.... Not more than two members of the Board shall be members of the same political party. [12 U.S.C. §2242(a)]</p> <p>The President shall appoint members of the Board who—(1) are experienced or knowledgeable in agricultural economics and financial reporting and disclosure; (2) are experienced or knowledgeable in the regulation of financial entities; or (3) have a strong financial, legal, or regulatory background. [12 U.S.C. §2242(e)]</p>	<ul style="list-style-type: none"> <li>• U.S. citizenship</li> <li>• Political balance on panel</li> <li>• Related knowledge, experience, or background</li> </ul>
Federal Communications Commission (IV - Chair is III)	Each member of the Commission shall be a citizen of the United States.... The maximum number of commissioners who may be members of the same political party shall be a number equal to the least number of commissioners which constitute a majority of the full membership of the Commission. [47 U.S.C. §154(b)]	<ul style="list-style-type: none"> <li>• U.S. citizenship</li> <li>• Political balance on panel</li> </ul>
Federal Deposit Insurance Corporation Board of Directors (IV - Chair is III)	The management of the Corporation shall be vested in a Board of Directors consisting of 5 members—(A) 1 of whom shall be the Comptroller of the Currency; (B) 1 of whom shall be the Director of the Consumer Financial Protection Bureau; and (C) 3 of whom shall be appointed ... from among individuals who are citizens of the United States, 1 of whom shall have State bank supervisory experience.... [N]ot more than 3 of the members of the Board of Directors may be members of the same political party. [12 U.S.C. §1812(a)]	<ul style="list-style-type: none"> <li>• U.S. citizenship</li> <li>• Related experience for at least one director</li> <li>• Political balance on panel</li> </ul>
Federal Election Commission (IV)	<p>No more than 3 members of the Commission appointed under this paragraph may be affiliated with the same political party. [52 U.S.C. §30106(a)]</p> <p>Members shall be chosen on the basis of their experience, integrity, impartiality, and good judgment and ... shall be individuals who, at the time appointed to the Commission, are not elected or appointed officers or employees in the executive, legislative, or judicial branch of the Federal Government. [52 U.S.C. §30106(a)]</p>	<ul style="list-style-type: none"> <li>• Political balance on panel</li> <li>• Experience</li> <li>• Specified character traits</li> <li>• Not part of the federal government</li> </ul>
Federal Energy Regulatory Commission (IV - Chair is III)	<p>Not more than three members of the Commission shall be members of the same political party. [42 U.S.C. §7171(b)(1)]</p> <p>The Chairman and members of the Commission shall be individuals who, by demonstrated ability, background, training, or experience, are specially qualified to assess fairly the needs and concerns of all interests affected by Federal energy policy. [42 U.S.C. §7134]</p>	<ul style="list-style-type: none"> <li>• Political balance on panel</li> <li>• Demonstrated ability, background, training, or experience</li> </ul>



Agency <sup>a</sup> (Executive Schedule Level of Members)	Provision(s)	General Requirement or Restriction
Federal Labor Relations Authority (V - Chair is IV)	The Federal Labor Relations Authority is composed of three members, not more than 2 of whom may be adherents of the same political party. [5 U.S.C. §7104(a)]	<ul style="list-style-type: none"> <li>• Political balance on panel</li> </ul>
Federal Maritime Commission (IV - Chair is III)	Not more than 3 Commissioners may be appointed from the same political party. [46 U.S.C. §301(b)]	<ul style="list-style-type: none"> <li>• Political balance on panel</li> </ul>
Federal Mine Safety and Health Review Commission (IV - Chair is III)	The Commission shall consist of five members, appointed ... from among persons who by reason of training, education, or experience are qualified to carry out the functions of the Commission.... [30 U.S.C. §823(a)]	<ul style="list-style-type: none"> <li>• Related training, education, or experience</li> </ul>
Federal Reserve System Board of Governors (II - Chair is I)	In selecting the members of the Board, not more than one of whom shall be selected from any one Federal Reserve district, the President shall have due regard to a fair representation of the financial, agricultural, industrial, and commercial interests, and geographical divisions of the country. In selecting members of the Board, the President shall appoint at least 1 member with demonstrated primary experience working in or supervising community banks having less than \$10,000,000,000 in total assets. [12 U.S.C. §241]	<ul style="list-style-type: none"> <li>• Geographic restriction</li> <li>• Representation of specified interests</li> <li>• Related demonstrated ability, background, training, or experience</li> </ul>
Federal Trade Commission (IV - Chair is III)	Not more than three of the commissioners shall be members of the same political party. [15 U.S.C. §41]	<ul style="list-style-type: none"> <li>• Political balance on panel</li> </ul>
Merit Systems Protection Board (IV - Chair is III)	The Merit Systems Protection Board is composed of 3 members ..., not more than 2 of whom may be adherents of the same political party. The members of the Board shall be individuals who, by demonstrated ability, background, training, or experience are especially qualified to carry out the functions of the Board. No member of the Board may hold another office or position in the Government of the United States, except as otherwise provided by law or at the direction of the President. [5 U.S.C. §1201]	<ul style="list-style-type: none"> <li>• Political balance on panel</li> <li>• Related demonstrated ability, background, training, or experience</li> <li>• Not part of the federal government</li> </ul>
National Credit Union Administration (IV - Chair is III)	The Board shall consist of three members, who are broadly representative of the public interest.... Not more than two members of the Board shall be members of the same political party.... [T]he President shall give consideration to individuals who, by virtue of their education, training, or experience relating to a broad range of financial services, financial services regulation, or financial policy, are especially qualified to serve on the Board.... Not more than one member of the Board may be appointed to the Board from among individuals who, at the time of the appointment, are, or have recently been, involved with any insured credit union as a committee member, director, officer, employee, or other institution-affiliated party. [12 U.S.C. §1752a(b)]	<ul style="list-style-type: none"> <li>• Representative of public interest</li> <li>• Political balance on panel</li> <li>• Consideration of related education, training, or experience</li> <li>• Prior affiliation restriction for all but 1 member</li> </ul>
National Mediation Board (IV - Chair is III)	There is established ... the “National Mediation Board”, to be composed of three members ... not more than two of whom shall be of the same political party. [45 U.S.C. §154]	<ul style="list-style-type: none"> <li>• Political balance on panel</li> </ul>

Agency <sup>a</sup> (Executive Schedule Level of Members)	Provision(s)	General Requirement or Restriction
National Transportation Safety Board (IV - Chair is III)	Not more than 3 members may be appointed from the same political party. At least 3 members shall be appointed on the basis of technical qualification, professional standing, and demonstrated knowledge in accident reconstruction, safety engineering, human factors, transportation safety, or transportation regulation. [49 U.S.C. §1111(b)]	<ul style="list-style-type: none"> <li>• Political balance on panel</li> <li>• Related technical qualifications, professional standing, and demonstrated knowledge for at least 3 members</li> </ul>
Nuclear Regulatory Commission (III - Chair is II)	There is established ... the Nuclear Regulatory Commission which shall be composed of five members, each of whom shall be a citizen of the United States. [42 U.S.C. §5841(a)(1)] Appointments of members ... shall be made in such a manner that not more than three members of the Commission shall be members of the same political party. [42 U.S.C. §5841(b)(2)]	<ul style="list-style-type: none"> <li>• U.S. citizenship</li> <li>• Political balance on panel</li> </ul>
Occupational Safety and Health Review Commission (IV - Chair is III)	The Commission shall be composed of three members who shall be appointed ... from among persons who by reason of training, education, or experience are qualified to carry out the functions of the Commission under this chapter. [29 U.S.C. §661(a)]	<ul style="list-style-type: none"> <li>• Related training, education, or experience</li> </ul>
Postal Regulatory Commission (IV - Chair is III)	The Postal Regulatory Commission is composed of 5 Commissioners.... [They] shall be chosen solely on the basis of their technical qualifications, professional standing, and demonstrated expertise in economics, accounting, law, or public administration.... Each individual appointed to the Commission shall have the qualifications and expertise necessary to carry out the enhanced responsibilities accorded Commissioners under the Postal Accountability and Enhancement Act. Not more than 3 of the Commissioners may be adherents of the same political party. [39 U.S.C.502(a)]	<ul style="list-style-type: none"> <li>• Related technical qualifications, professional standing, and demonstrated expertise</li> <li>• Political balance on panel</li> </ul>
Privacy and Civil Liberties Oversight Board (IV: daily equivalent - Chair is III)	... shall be selected solely on the basis of their professional qualifications, achievements, public stature, expertise in civil liberties and privacy, and relevant experience, and without regard to political affiliation, but in no event shall more than 3 members of the Board be members of the same political party. [42 U.S.C. §2000ee(h)]	<ul style="list-style-type: none"> <li>• Related qualifications</li> <li>• Related experience and achievement</li> <li>• Related knowledge</li> <li>• Apolitical appointment</li> <li>• Political balance on panel</li> </ul>
Railroad Retirement Board (IV - Chair is III)	One member shall be appointed from recommendations made by representatives of the employees and one member shall be appointed from recommendations made by representatives of employers[as statutorily defined], in both cases as the President shall direct, so as to provide representation on the Board satisfactory to the largest number, respectively, of employees and employers concerned. One member, who shall be chairman of the Board, shall be appointed without recommendation by either employers or employees and shall not be in the employment of or be pecuniarily or otherwise interested in any employer or organization of employees. [45 U.S.C. §231f(a)]	<ul style="list-style-type: none"> <li>• Two members from recommendations of specified constituent groups</li> <li>• Third member cannot be from specified constituent groups</li> </ul>

Agency <sup>a</sup> (Executive Schedule Level of Members)	Provision(s)	General Requirement or Restriction
Securities and Exchange Commission (IV - Chair is III)	Not more than three ... commissioners shall be members of the same political party, and in making appointments members of different political parties shall be appointed alternately as nearly as may be practicable. [15 U.S.C. §78d(a)]	<ul style="list-style-type: none"> <li>• Political balance on panel through alternating appointments</li> </ul>
Surface Transportation Board (IV - Chair is III)	Not more than 2 members may be appointed from the same political party.... At any given time, at least 2 members of the Board shall be individuals with professional standing and demonstrated knowledge in the fields of transportation or transportation regulation, and at least one member shall be an individual with professional or business experience (including agriculture) in the private sector. [49 U.S.C. §701(b)]	<ul style="list-style-type: none"> <li>• Political balance on panel</li> <li>• Related professional standing and demonstrated knowledge for at least two board members</li> <li>• Private sector experience for at least one member</li> </ul>

**Source:** Developed by Congressional Research Service from information obtained from the *United States Code*.

**Note:** Table information current through September 1, 2015.

a. Agencies are arranged alphabetically.

## **Author Information**

Henry B. Hogue  
Specialist in American National Government

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